relation to the facts of the particular case."

And in the commentary on the Indian Act referred to before, the presumption of continuing insanity is brought under illustration (d) to the section, i.e. "that a thing or state of things which has been shown to be in existence within a period shorter than that within which such things or states of things usually cease to exist is still in existence" (*Ameer Ali*, 9th edition p. 807).

In this respect Section 56 and section 57(1) (ix), (2), (3) of the Evidence Enactment are relevant.

In this particular case one of the difficulties arising on the question of fact which is all that now remains to be considered is the absence of any knowledge, or at any rate any direct knowledge, of the nature of the unsoundness of mind from which the Testator suffered in 1905.

We do know it is not a case of delusions, which appears to rule out both "Mania" and "monomania."

Mortimer on Probate (2nd edition p. 43) states:—

> "Medical jurists have commonly recognized 4 forms which insanity may take; mania, monomania, dementia, and idiocy (amentia)."

It is not a case of idiocy, so by a process of elimination I conclude that it was a case of dementia.

On pages 47—48 of Mortimer are described the characteristics of dementia.

In *Austin* v. *Graham*, (1854) 14 E.R. 188 we find the following which appears relevant to a case of dementia:—

> "As the insanity attributed to the deceased was not monomania but a general mental derangement and as the proper mode of testing this allegation was to review the life, habits and opinions of the Testator."

The position then is that following from the Order of Court of 1905 there is a presumption that this Testator was still of unsound mind on 22nd May 1928, the date of the Codicil in dispute. And the question for determination is whether the evidence is sufficient, in view of this, to discharge the burden of proof and establish that the Testator had that degree of soundness of mind which gives testamentary capacity.

The most important evidence is clearly that of the two doctors.

Now, even if these two doctors are to be considered as experts and their evidence valued on that basis, the value of the opinion of an expert, when challenged, as in this case, is dependent upon how his opinion has been formed, what data he had, what examination and investivation he made. The expert cannot be allowed to substitute his bare opinion for what the Court has to find.

It suffices for me to say that I am in complete agreement with the criticisms of the evidence of these witnesses contained in the judgment and with the evaluation thereof by the learned Trial Judge.

I also agree substantially with the views of the learned Judge on the remaining evidence of fact and the other material questions he decided.

I am of opinion, therefore, that this appeal should be dismissed.

The costs of the Respondents, as between Solicitor and client, should be paid out of the estate. The Appellant should bear his own costs.

Appeal allowed.

[APPELLATE CRIMINAL JURISDICTION]
HOWES, Ag. C.J. (F.M.S.) TERRELL, Ag. C.J., (S.S.) & AITKEN, J.

October 1, 1937.

SANTA SINGH vs. PUBLIC PROSECUTOR.

[SELANGOR CRIMINAL APPEAL No. 11 of 1937].

Criminal Law—common intention—direction—sufficiency of—non-direction on certain aspects of evidence—effect of—powers of Court of Criminal Appeal—Penal Code, s. 34.

Where a trial judge in his charge to the assessors directs that, "if two or more persons armed with weapons jointly and in common attack a man, then it matters not which of them strikes the blow. The common intention is to attack the man with weapons. In a case such as that each person, whether it be one or more, is equally guilty in just the same way as if there were only a single assailant."

Held, that such a direction is a correct statement of the law on the subject of common intention.

Rex v. *Vincent Banka*, 5 M.L.J. 66 and *Rex* v. *Chhui Yi*, 5 M.L.J. at p. 180 referred to and applied.

In a proper case the Court of Criminal Appeal has power to allow an appeal, even when the evidence has been fairly and accurately summed up by the trial judge, if the case against the prisoner has not been proved with that certainty which is necessary in order to justify a verdict of guilty. *William Herbert Wallace*, 23 Cr. A. R. 35 referred to.

M. E. A. Farr, for the Appellant.

C. H. Whitton, Deputy Public Prosecutor.

The judgment of the Court (**HOWES, AG. C.J. (F.M.S.), TERRELL, AG. C.J. (S.S.) & AITKEN, J.**) was as follows:—

In this appeal three grounds have been argued; the first being that "the learned Judge was wrong in his direction of the law in the case of murder."

In particular, Mr. Farr, the Advocate assigned to the appellant, argued that the learned Judge was incorrect in his statement of the law as regards 'common intention' which was:—

> "If two or more persons armed with weapons jointly and in common attack a man, then it matters not which of them

strikes the blow. The common intention is to attack the man with weapons. In a case such as that each person, whether it be one or more, is equally guilty in just the same way as if there were only a single assailant."

The law as to common intention was considered at length in the case of *Rex* v. *Vincent Banka & another*, (5 M.L.J. 66) by the Court of Criminal Appeal in Singapore. In that judgment (at page 70) it was stated:—

> "The learned Judge should have told the jury, in effect, that they had first to be satisfied as to the identity of the robbers; that then, if so satisfied, they had to consider the further question whether on the evidence placed before them they were satisfied as to the existence of a common intention between the robbers not merely to commit robbery but, if necessary, to kill the deceased, . . . and that they could not properly convict either of the accused of murder unless they were satisfied that this common intention existed."

That judgment was, however, considered and explained in the later case of *Rex* v. *Chhui Yi* (5 M.L.J. at page 180) by the Court of Appeal at Singapore, in the following terms:—

> "The Court recently considered this question in the case of *R.* v. *Banka & another*, where the terms of section 34 of the Penal Code were summed up in the following phrase:—'Under the terms of that section—there must exist a common intention to commit the crime actually committed, and it is not sufficient that there should merely be a common intention to behave criminally.' That does not, of course, mean that, in the case of murder, there need have been a common intention actually to kill but there must have been a common intention to do any of the acts which are described in sections 299 and 300 of the Penal Code and the doing of which, if death in fact results, amounts to murder."

If the assessors believed the evidence of Kernail Singh (page 5) that he saw the appellant strike the deceased with the knife and that Naranjan Singh struck him also with his knife; then the learned Judge's direction (which follows the principle laid down by the Court of Appeal in *R.* v. *Chhui Yi, supra*) was a perfectly correct statement of the law on the subject. The intention of an accused person can only be judged by his acts; and if one or more persons attack another, who is unarmed, with knives in such a manner that death results, it may be presumed that they did so with the intention of causing such bodily injury as was sufficient in the ordinary course of nature to cause death.

The first ground of appeal, so far as it relates to the direction by the learned Judge on common intention, therefore, fails, because if the evidence was accepted, there was clearly a common intention by both the appellant and Naranjan Singh.

The second ground of appeal was that 'there was non-direction on certain facts in favour of the accused by the learned Judge.'

The third ground was 'that the conviction was against the weight of evidence.'

These two grounds can be considered together, and the following points in the evidence and summing up, appear to the Court to be relevant.

1. The doctor's evidence as to the blows. The doctor described the injuries in sequence, and numbered them 1 to 16. He said:—

> "Wound No. 1 was a necessarily fatal wound; it must have been fatal itself. I doubt if the man could have walked after receiving wound No. 1. I would say that death would be more or less instantaneous after receiving that wound."

The learned trial Judge (page 58) referred to this as 'the first wound,' but did not point out to the assessors that the numbers allotted by the doctor to the injuries were purely arbitrary, and had no reference to the order in which they were inflicted.

2. Kernail Singh, the principal witness for the prosecution stated (page 5):

> "First Santa Singh struck Sham Singh with the knife . . . Santa Singh struck the first blow."

It may well be that upon this evidence the assessors were of opinion that the fatal blow was struck by Santa Singh, whereas the medical evidence shows that this could not have been so, as spot 'I' on the plan (which was identified by Kernail Singh as the place where he first saw Santa Singh and Naranjan Singh) was an appreciable distance from spot 'E' where the body was found, viz. between 90' and 100'.

3. Kernail Singh's explanation of the blood stains on his shirt was very unsatisfactory. They were caused, he said, by the wet blood on Naranjan's hand when the latter tried to seize Kernail Singh immediately after Naranjan and the accused had completed the killing of the deceased. Counsel for the appellant suggested that if Kernail Singh was being chased by one of the murderers, the probabilities were that he would have been injured; and it seems to us that his explanation of those blood stains on his shirt is, on the balance of probabilities, far from convincing.

4. Kernail Singh also was very emphatic as to the identity of the knife, which he said "is Santa Singh's knife," and in cross-examination (page 10) "Exhibit A (the knife) is the knife which was in the hands of the accused. 'A' is

the very identical knife the accused had." He also said (page 5) that this knife was fixed on a stick, and yet it was demonstrated before us that the knife found by Chow Ngan did not fit the stick which she also found.

5. How Kernail Singh was so familiar with the knife which he said belonged to the accused was not explained. Kernail Singh's evidence throughout appears to us to be too detailed to be trustworthy e.g. (page 6) " I noticed Santa Singh was wearing a shirt made out of flour bags or some cloth like that." It seems scarcely believable that Kernail Singh should have noted such details, even on a moonlight night; especially if we accept his story that he was chased by the murderers and was so near to being caught that Naranjan's clutching hand left several blood stains on his shirt.

6. Jagir Singh who worked for the appellant (page 11) gave an account of a quarrel and fight the same afternoon at about 4 p.m. between Naranjan Singh and the deceased, in which he said he intervened and stopped the fighting. No mention was made by Kernail Singh of any such fight, although, presumably, he was near at the time. Jagir Singh supported Kernail Singh's story as to what occurred at about 8-15 p.m. so far as having heard shouts, and recognised Kernail Singh's voice saying "Don't strike, don't strike." He met Kernail Singh who told him that Naranjan Singh and Santa Singh had killed Sham Singh; but Kernail Singh made no mention of the fact that he himself had been chased and threatened by one of the murderers.

7. There was further a grave inconsistency between the evidence of Kernail Singh and Jagir Singh as to their positions at the time of the murder. According to Kernail Singh, Jagir Singh was behind him i.e., in the direction of the mining pool. Kernail Singh apparently knew he was there, but did not shout to him. When however he met Jagir Singh, it was 60 or 70 yards from the place where Kernail Singh had been standing, in the direction of the public road. Clearly, therefore, Jagir Singh must have passed Kernail Singh, but Kernail Singh says that he never saw him passing. Jagir Singh however says that at the time of the occurrence he had already started driving his cattle home, and was between the public road and the Chinese woman's compound, because he saw the accused and Naranjan Singh coming out of the gap in the hedge. They passed him but did not speak. Jagir continued to drive his cattle towards the public road, and there met Kernail Singh. If Jagir Singh's evidence is to be believed, and Kernail Singh never passed him, and he only met him coming from the Ampang Road, Kernail Singh cannot have been an eye-witness of the occurrence. These difficulties were never pointed out to the assessors in the summing up.

8. Again, according to Kernail Singh, after the attack on the deceased, he saw Santa Singh and Naranjan Singh gathering Sham Singh's cattle; and the suggestion is that they took the cattle to the Circular Road police station to be impounded. From the evidence of police constable Shafie (page 32) it is shown that two Sikhs brought about twenty buffaloes to the police station and went away. The policeman was unable to recognise the Sikhs. The suggestion that the appellant and Naranjan Singh took the cattle of the deceased to be impounded, was denied by the appellant (page 51), although he did go to the Campbell Road police station; because, he said, when he reached his house he found half of his cattle tied and half were loose, and none of his herdsmen was there. It was then that he was arrested. It certainly seems a curious story, that two men who had just murdered another should take his cattle to the police station, and yet if the witness Ujagar Singh (page 25) is to be believed, that was what happened.

9. The evidence of Balwant Singh, Chagar Singh, and Bhan Singh was of little value, and as the learned trial Judge said (page 70) they gave no original evidence. They merely related what Kernail Singh had told them, viz. that Santa Singh and Naranjan Singh had killed Sham Singh and had taken away the buffaloes; and yet the learned trial Judge (page 70) told the assessors that:—" this was corroboration of those witnesses." How such a statement can be regarded as corroboration, it is difficult to understand.

And these are the three men about whom Rodah Singh (page 40) made a report (which was not put in evidence) to the effect that he saw them setting out from Balwant Singh's house about 6 p.m. that evening, Balwant Singh being armed with a knife on a changkol handle and the other two being armed with sticks. Rodah Singh said he thought they were going to have a fight, and he had better inform the police at Ampang police station. According to Mat Sah, the sergeant in charge, Rodah Singh did so report, Mat Sah says, from the station diary, at 9-40 p.m. the witness Rodah Singh says ' it was about evening time when the sun sets.' Whilst 9-40 p.m. may have been the time the report was recorded, it is difficult to reconcile this time with that given by Rodah Singh. This difference as to time, however, may be due to Mat Sah having left the police station that evening for his bath and his evening meal at 6 p.m., as he admits he did. And it is noteworthy that he did not say when he returned to the police station.

10. Then we have the curious story told by Harnam Singh (page 36) that the appellant came to his house that night with Naranjan Singh and asked for a " baju " as his own was " slightly wet." Harnam Singh wished the Court to believe that although he had no other shirt, he gave the appellant his own, and kept the appellant's and

was wearing it when the Malay Inspector came to his house at 5 a.m. next morning while he was asleep. Harnam Singh was taken to the police station where the shirt which he says belonged to the appellant was taken from him, and was subsequently found to have blood-stains on it (Ex. M). The learned trial Judge in his summing up (page 64) appears to have accepted Harnam Singh's story, and made no comments on its improbability. The appellant admitted that he went to Harnam Singh's house that evening at about 7 p.m. when Harnam Singh was not there, and talked with Harnam Singh's younger brother Hazara Singh until Harnam Singh came back about 9 p.m. The appellant says he went alone to Harnam Singh's house to see him about taking away a he-buffalo which Harnam Singh admitted he had borrowed from the appellant. An argument ensued, and the appellant left without the buffalo. The appellant stoutly denied the story of the changed shirts, and it seems to be common ground that after going to his own house and finding his cattle loose, the appellant went to the police station for some reason: he says, to report about his cattle. Harnam Singh admitted that his brother Hazara Singh was at home that night; but said that the appellant came in after he (Harnam Singh) returned. Hazara Singh might have been a very important witness to the appellant, but he was never interviewed by the police; Harnam Singh when recalled (page 53) stated that Hazara Singh went to India about the 11th May, because of the death of their father. Apparently the learned Judge and assessors accepted Harnam Singh's evidence without the slightest hesitation although it is obvious that he would naturally be anxious to fix the ownership of that blood-stained shirt on some one else if, as is quite possible, it was his own.

11. The evidence of Lall Singh the tailor (page 38) struck us as equally unconvincing. How this witness was obtained, did not appear. He admitted that at the police station he was asked if he had made any shirts for the appellant, and he identified the blood-stained shirt (Ex. M) as the one he had made for the appellant, out of a number of other shirts, on which there were no blood stains, by a certain pocket and stitching. At the preliminary enquiry he had mentioned certain button-holes, but did not do so at the trial.

Dealing with Lall Singh's evidence the learned trial Judge told the assessors ' whether you accept that evidence or not is a matter for yourself." The possibility of this evidence being perjured was not put to the assessors: and yet the tailor's evidence was vital as supporting that of Harnam Singh.

The appellant (page 51) said " The shirt Ex. M is not mine. I do not know who the tailor Lall Singh is. I do not know who he is. I have only seen him in Court."

12. The evidence of Mr. Nattrass (page 13), in our view, was not adequately put to the assessors by the learned trial Judge. The learned Judge described it (page 59) as " a general background on which to consider the evidence of Kernail Singh and Jagir Singh: but in our view it was of the utmost importance when considered with the plan of the scene and contrasted with Kernail Singh's story of a swift and silent killing. Mr. Nattrass was entirely disinterested. He lives in the house marked " C." He heard a disturbance at about 8 p.m. in the night, which developed into more noise and screaming and yelling. Then, there was silence for about three minutes, followed by more noise, yelling and a banging and smacking noise. These noises stopped, but in a few seconds were renewed " further down the lane coming towards the Ampang Road " i.e. towards the south. As he stood on the verandah he saw the heads of people (in cross-examination he saw roughly about four) close together, at about point " JK " on plan, and then saw a white cloth hung over the bamboo hedge at point " S " on the plan. This cloth he threw back into the road, and it was discovered afterwards. About 10 minutes later, a lot of buffaloes came into his compound. After the cloth had been thrown over the hedge, from a point further down the road from point S towards the Ampang Road, he heard more noises *going towards Ampang.* It was after he had heard the noise of cattle going towards Ampang that the cattle came into his compound, and he drove them out. After this, his daughter and son-in-law Mr. Taylor arrived in a car, followed by a Chinese woman who told Mr. Taylor about the deceased being seriously hurt. Mr. Nattrass went with Mr. Taylor and saw the body at point FE on the plan.

13. The materiality of Mr. Nattrass's evidence arises from the discovery of the various objects which were found in the lane practically opposite his house, and further south from the point where the body of the deceased was found. At point ' S ' a hair comb (Sikh pattern) was discovered. At point ' P ' a black cloth. At points ' L ' and ' N ' pools of blood, at point ' O ' a pair of wooden clogs, one of which was proved to be blood-stained. At point ' M ' a torch light, which had no light. At point ' U ' an umbrella was found by detective police constable Pertab Singh (No. 168) amongst some pineapple plants. It was blood-stained, and was stated by Jagir Singh to be similar to the one carried by deceased, when in the afternoon, he separated, Naranjan Singh and the deceased. At point ' J ' and ' K ' two tufts of black human hair were found. If Mr. Nattrass's evidence was to be believed, and we can see no reason whatsoever why it should not, it is perfectly obvious that Kernail Singh's evidence at once comes under the gravest suspicion.

14. As regards the above articles found in the lane, the learned trial judge told the assessors that the ownership of them had not been proved, and added:—

> "These various articles do not in any way assist in the case but they are collected in the ordinary course of investigation to see if they are in any way connected with the cases."

In our view these objects are of considerable importance, as tending to show that, as stated by Mr. Nattrass, the attack or fight began at a point a considerable distance from where the witness Kernail Singh described the attack by the appellant and Naranjan Singh on the deceased; and also as indicating that (taking Mr. Nattrass's evidence that he saw four heads on the hedge) at least one more person was involved.

From the point 'R,' from which Kernail Singh says he first saw the attack, it is very doubtful whether he could have seen what took place at points 'L,' 'M,' 'N' and 'O,' which were about twice as far away from point 'R' as point 'I,' where he said the first attack on the deceased took place. It seems to follow, therefore, that either he did not see or hear what took place at these points, or that he deliberately ignored what happened there when he gave his evidence.

15. Once discredit is put in the direct evidence of Kernail Singh, the case for the prosecution against the appellant is considerably weakened. The learned trial Judge (page 70) pointed out to the assessors that it was upon the evidence of Kernail Singh and Jagir Singh principally that the prosecution case rested. He might almost have said upon the evidence of Kernail Singh alone. Take away Kernail Singh's evidence, and the other evidence was such as to be easily capable of fabrication, which was the suggestion of the appellant, viz. (page 51) "They have all conspired and decided to put me into trouble." We have already given our reasons for regarding Kernail Singh's evidence with very grave suspicion, yet none of those reasons seems to have been clearly before the minds of the learned Judge and his assessors.

16. The appellant in cross-examination stated that Kernail Singh's reason for giving false evidence against him was because on two occasions the appellant had seen Jagir Singh and Naranjan Singh kissing him and had warned him. Later he says:—

> "Jagir Singh also has a grudge against me because I reprimanded him for kissing that boy."

It was never put to the Assessors that the two principal witnesses against the appellant might have had a grudge against him, nor were they reminded that, whereas the accused was a Baba Sikh, all the witnesses against him were Jat Sikhs.

17. Lastly in the summing up, the learned trial Judge reviewed the whole of the evidence at great length, but (page 58) told the assessors that they must form their own individual independent conclusion upon the question of fact in issue. He added:—

> "You must not look for any suggestion or guidance from me; I will not give it to you; all I will do is to bring before you in the most logical arrangement I can, the evidence which you have heard.

From the point of view of misdirection, the Court is of opinion that this was essentially a case where the learned trial Judge, while leaving the decision to the assessors, might have assisted them by scrutinizing the evidence, and calling attention to the many inferences which might legitimately have been drawn in favour of the appellant. Reference has been made above to several points, some of them of crucial importance, upon which he failed to direct them at all. The fact that the assessors retired for one minute only may, of course, point to the conclusion that they were completely satisfied as to the guilt of the appellant. If however the inconsistencies in the evidence of the witnesses for the prosecution, the improbabilities with which the prosecution's case bristled, the failure to produce as a witness Hazara Singh who might have corroborated the appellant's story and did not leave the country for 2 months after the murder and the possibility of a false case having been concocted against the accused, had been brought home to the assessors by the learned Judge, it is hardly possible that they would have brought in a verdict after only a minute's retirement. The Court is entitled to conclude that they never appreciated the difficulties of the case, and never properly weighed the evidence.

Apart from the question of misdirection, the Court has a duty to allow an appeal if the verdict is unreasonable, or cannot be supported having regard to the evidence. An appeal on these grounds is rarely allowed, as it is not sufficient merely to show that the case against the appellant is a weak one (*R.* v. *McNair* 2 Cr. A.R. p. 2). But in a proper case, the Court will exercise its powers to allow an appeal, even when the evidence has been summed up by the trial Judge with complete fairness and accuracy. (*William Herbert Wallace*, 23 Cr.A.R. p. 35). It is sufficient to say that in the opinion of the Court the case against the appellant has not been proved with that certainty which is necessary in order to justify a verdict of guilty of murder.

For these reasons the appeal was allowed, the conviction set aside and the appellant discharged.

Appeal allowed.